83 - 1093

# In the Supreme Court of the United States

OCTOBER TERM, 1983

THE PEOPLE OF THE STATE OF MICHIGAN,

*Petitioner*

vs.

GREGORY DEVAL PARKER

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

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## QUESTION PRESENTED

IS THE HOLDING OF THE MICHIGAN SUPREME COURT THAT THE ARREST OF RESPONDENT VIOLATED THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION UNEXCUSED BY EXIGENT CIRCUMSTANCES A REVERSIBLY ERRONEOUS APPLICATION OF DECISIONS OF THE UNITED STATES SUPREME COURT AND THE CIRCUIT COURT OF APPEALS.

## TABLE OF CONTENTS

## INDEX OF AUTHORITIES

## PETITION FOR A WRIT OF CERTORARI TO THE MICHIGAN SUPREME COURT

NOW COME the People of the State of Michigan by John D. O'Hair, Prosecuting Attorney for the County of Wayne; Edward Reilly Wilson, Deputy Chief, Civil and Appeals; and A. George Best II, Assistant Prosecuting Attorney, and pray that a writ of certiorari issue to review the judgement of the Michigan Supreme Court entered in the above-entitled cause on 24 October 1983.

## OPINIONS BELOW

Respondent's conviction was affirmed by the Michigan Court of Appeals in *People v Parker*, 96 Mich App 80 (1980), said opinion being attached hereto as Appendix A. Respondent's conviction was also affirmed by the Michigan Court of Appeals on Rehearing in *People v Parker (On Reh)*, 100 Mich App 496 (1980), said opinion being attached hereto as Appendix B. Respondent's conviction was reversed by the Michigan Supreme Court, *People v Parker*, 417 Mich 556, (1983), said opinion being attached hereto as Appendix C. On 18 November 1983, the Petitioner filed an Application for Clarification in the Michigan Supreme Court relating to a dicta statement (reversal was not predicated on this statement) by that Court involving future armed robbery jury instructions, said Application is attached hereto as Appendix D.

## STATEMENT OF JURISDICTION

The opinion of the Michigan Supreme Court was issued on 24 October 1983. The jurisdiction of this Honorable Court is invoked under and pursuant to 28 USCA 1257(3) and *Miranda v Arizona*, 384 US 436, 16 LEd2d 694, 737, fn 71, 86 S. Ct. 1602 (1966).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides that;

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides thin relevant part that:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF FACTS

At approximately 9:00 PM on 22 February 1978, Marion Wilson, the complainant, was alone in her car. She was in the parking lot of an apartment complex attempting to find a specific address. A man, later identified as the defendant, gained entry to her vehicle by spraying some substance into her face which temporarily obscured her vision. The man told her that he would not hurt her if she would be quiet and not scream.

He told her that if she did not do exactly as he said, he would stab her. After making those statements, he took $12.00 in US currency from her purse. The man then told the complainant

to drive the car to another location. He sat next to the complainant and put his arm around her neck. (TR 142-148) He told her that;

> "we are going to act like lovers, and if you do anything, I will hurt you." And I had — I didn't see anything in his hands, but his right hand was up against my side. (TR 151-152)

The defendant forced the complainant to drive to another location where they stopped. The defendant then forced the complainant into the back seat of the complainant's car and told her that "now he was going to get some pussy". (TR 155) The complainant then began fighting with the defendant; he beat her with his fists. She managed to scratch his face, causing him to bleed. After the rape was finished, the complainant managed to escape from her vehicle. She called the police who responded to the scene. The complainant provided a partial physical and clothing description of her assailant to the police and, while looking in the back seat of her car, discovered a wallet which belonged to the defendant. (TR 133-165) After receiving her report, police broadcast defendant's description at some point shortly after 9:30 PM. (TR 291) The complainant was then taken to the hospital.

At about 10:30 PM an officer of the Detroit Police Department assigned to the Sex Crimes Unit went to the hospital and interviewed the complainant. (TR 56-58) The information was then provided to officers of the Major Crimes Mobile Unit, a tactical operations unit of the Detroit Police Department, at about 11:45 PM. Testimony indicated that this special unit was "a plain clothes unit that goes out investigating cases for the Homicide Section and the Sex Crimes Unit." (6 June 78:4) One of the officers from that unit, Officer Miller, testified that he and his partners started their shift at 7 PM and worked till 3 AM the following day. During their shift, they had made one arrest in another case and returned

with that person to police headquarters. The required paperwork on that case was completed about 11:45 PM. The officer then checked with Homicide and Sex Crimes to see "if anything new has developed that night". (6) This officer and his partners were told of the occurrence of the rape and armed robbery. They were given the information pertaining to the physical description and the clothing description of the assailant, the fact that he had been scratched under one eye, and were given address information obtained from the wallet of defendant recovered from the complainant's car. (6–8) The officers took this information, went to the 13th Precinct and finished the paperwork on their last case and then went to attempt to locate this defendant. These officers went to the address on Chene street contained in the wallet. Once there, the officers called their base and attempted to find a telephone number for the defendant at that address to try to call him. (8) The telephone call was made and a female told the police that the defendant no longer lived there. That person then provided another address for the defendant, 234 Watson. (9) The officers went to Watson and discovered that that number did not exist. They again contacted their headquarters and an officer at headquarters again called the female who had given the Watson address. This time a new number was provided, 271 Watson. The female was determined to be the defendant's mother. (9–10) The police then went to that address and knocked on the door. That number appeared to be a boarding house. The owner of the building answered the door and in response to a police question, stated that defendant did live there but that he was not at home at the present time. (10) The owner then walked across the hall to Apartment 11 and knocked on the door and called defendant's name several times.

There was no answer. The owner then returned to his apartment, got a key, and opened the door to defendant's room.

(11) The officers saw the defendant lying on a bed with his back to the door and one arm held under the pillow, went over to him, and awakened him. The defendant sat up and the officer noticed a small laceration under his right eye with a trace of dried blood. (13) The defendant was placed under arrest and, after asking for his clothes, the officers first searched them recovering a five inch long nail file and $12.00 US currency. (14–15) On cross examination, the officer indicated that he had gone to Watson to attempt to find the first address at 2:25 AM. He and his partners remained there for about ten minutes. He and his partners arrived at the second Watson address about 2:45 AM. (18–19) On re-direct, the officer indicated that when defendant was arrested he attempted to find his identification and made a comment that "he couldn't find his wallet". (25)

At a pretrial suppression hearing, the trial prosecutor specifically cited and argued *Dorman v United States*, 435 F2d 392 (1970). (40–44; 47–49) The trial court denied the motion to suppress. (49–50)

From the time of the initial police broadcast of defendant's description to the time of the arrest, about five hours and fifteen minutes passed; from the time the identification and address information was given to the MCMU tactical unit to the arrest, about three hours passed.

The Michigan Court of Appeals twice upheld the defendant's conviction. On appeal granted by the Michigan Supreme Court, that Court found a violation of the US Fourth Amendment in that arresting police officers did not possess a warrant for the arrest of the defendant at the time they entered his apartment and that there did not exist exigent circumstances which would serve as an exception to the warrant requirement.

## ARGUMENT

### IS THE HOLDING OF THE MICHIGAN SUPREME COURT THAT THE ARREST OF RESPONDENT VIOLATED THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION UNEXCUSED BY EXIGENT CIRCUMSTANCES A REVERSIBLY ERRONEOUS APPLICATION OF DECISIONS OF THE UNITED STATES SUPREME COURT AND THE CIRCUIT COURT OF APPEALS.

As noted in the Statement of Facts presented above, the complainant was forcibly raped and robbed by this defendant at some point between 9 and 9:30 PM on 22 February 1978. Police responded to the scene of the rape and received a description of the defendant, his clothing, the events, and found his wallet containing his name and an address on the back seat of the complainant's car where the rape had taken place. This information was presented to a tactical unit of the Detroit Police Department at 11:45 PM and the defendant was arrested at about 2:45 AM, some three hours later. The Michigan Supreme Court addressed these facts and, after reviewing them in light of *Payton v New York*, 445 US 573, 100 S. Ct. 1371, 63 LEd2d 639 (1980), found the absence of an arrest or search warrant required the invalidating of the arrest and the suppression of all evidence seized subsequent to that arrest. The Court also found that the argument advanced by the People that there existed "exigent circumstances" of such a nature that the warrant requirement was excused was without merit. The decision of the Michigan Supreme Court was based solely upon federal case law precedent.

## A

## THIS HONORABLE COURT HAS JURISDICTION TO REVIEW THIS MATTER AS THE STATE DECISION BELOW IS BASED SOLELY ON THE CONSTITUTION OF THE UNITED STATES AS INTERPRETED BY FEDERAL CASE LAW PRECEDENTS AND DOES NOT RELY ON AN ADEQUATE AND INDEPENDENT STATE GROUND.

The decision of the Michigan Supreme Court finding reversible error in the arrest and search of this defendant cites not one Michigan case, nor does said opinion make even passing reference to the Michigan Constitution (save for a one half sentence reference in the concurring opinion of one justice of that court.) It is thus clear that the presently challenged decision represents Michigan's interpretation of federal law and that this Honorable Court may review that decision. *Michigan v Long*, ____ US ____, 103 S. Ct. ____, 77 LEd2d 1201, 1212-1216 (1983); *Oregon v Kennedy*, 456 US 667, 102 S. Ct. 2083, 72 LEd2d 416, 421 (1982).

## B

## THE DECISION OF THE MICHIGAN SUPREME COURT IS ERRONEOUS AND MUST BE REVERSED FOR THE REASON THAT THAT COURT HAS MISAPPLIED FEDERAL CONSTITUTIONAL PRECEPTS AND FEDERAL CASE LAW PRECEDENTS IN THAT DETROIT POLICE DID PROPERLY ARREST THIS DEFENDANT WITHOUT FIRST HAVING OBTAINED AN ARREST WARRANT BECAUSE OF THE EXISTENCE OF EXIGENT CIRCUMSTANCES.

Addressing the facts presented above, the Michigan Supreme Court reversed the defendant's conviction. That Court held that;

> The parties agree that the arrest of defendant without a warrant in his abode was illegal unless the circumstances surrounding its were exigent. . . . The essence of the exigency which could excuse the failure to obtain a warrant is the existence of circumstances known to the police which prevent them from taking time to obtain a warrant because to do so would thwart the arrest.
>
> • • •
>
> . . . we conclude that the facts do not support a finding of such exigent circumstances as would obviate the need for an arrest warrant. (561)
>
> • • •
>
> In the case at bar, there was over a five hour delay between the time the police were given a physical description of the complainant's assailant and when they arrested the defendant without a warrant. The prosecution has offered no explanation as to why a warrant was not sought during this interval. . Inasmuch as the prosecutor has not offered any countervailing circumstances which justify the failure to secure a warrant, we hold that the police did not act reasonably in entering defendant's room without a warrant, arresting him, and seizing evidence. (563)

The Michigan Supreme Court relied on *Payton*, *supra*, and two additional federal cases, *Niro v United States*, 388 F2d 535 (CA1-1968), and *United States v Houle*, 603 F2d 1297 (CA8-1979) both decided prior to *Payton*. No reliance was placed on any state case or on the state constitution for the result reached. No mention was made of *Dorman v United States*, 435 F2d 385 (1970), and it's list of suggested factors that would tend to lend

support for the finding of the existence of an exigency that would justify a warrantless entry and arrest even though Dorman and its factual basis was relied upon by the prosecution in the trial court and in its brief and in oral argument to the Supreme Court and notwithstanding the fact that in another exigent circumstances/warrantless arrest case decided by the same court one month earlier, *Dorman* assumed central if not controlling importance. *People v Oliver*, 417 Mich 366, 384 (1983).

When *Dorman* and its progeny are viewed in contrast to the federal cases cited by the Michigan Supreme Court, it is readily seen why that Court chose not to rely upon *Dorman*: the factual history of *Dorman* and the instant case are almost identical.

In *Dorman*, *supra*, four men had robbed a clothing store shortly after 6 PM. Police responded to the scene and conducted an on-the-scene investigation from 7:00 to 7:30 PM. During this investigation, one of the officers found the pants worn by defendant Dorman on the changing room floor. In those pants was a copy of a "monthly probation report" which contained Dorman's name and address. Officers took the victims to the police station where a photograph of Dorman was produced from police files, the victims positively indentified him as one of the robbers. Police contacted an Assistant US Attorney to initiate procedures for obtaining an arrest warrant. (387) That attorney told the officer that no magistrate was available but that since a felony were involved, no warrant was necessary. Police then went to Dorman's address about 10:20 PM where they knocked and announced their indentity. Police searched the residence, did not find Dorman, but left men inside the apartment to apprehend him if he returned. One of the suits stolen from the clothing store was recovered at this time. (386) Dorman was arrested the next day while riding in an automobile. (400)

After discussing general Fourth Amendment warrant law, the Court noted that "a principle of urgent need, also operates to justify warrantless entries with requisite need determined by an officer and not by a court." (391) The Court also noted that this "urgent need" had been found to arise where a case developed in a manner so as not to allow either time or opportunity to apply to a magistrate for a warrant; and where "hot pursuit" was found to exist; "hot pursuit" being said by the Court not to be "a limitation but rather an illustration of the kind of exigent circumstance justifying entry without a warrant to arrest a suspect." (391) The court recognized the "heavy burden on the police" to justify any such warrantless entry and then devised a series of factors to help a reviewing court decide whether such exigent circumstances did exist with reference to the facts of a given case. These factors were defined as follows:

1) Whether a grave offense had been committed, "particularly one that is a crime of violence";

2) Whether the suspect was "reasonably believed to be armed";

3) Whether there existed a "clear showing of probable cause, including 'reasonably trustworthy information' to believe that the suspect committed the crime involved";

4) Whether there existed "strong reason to believe that the suspect is in the premises being entered";

5) Whether there existed a "likelihood that the suspect will escape if not swiftly apprehended";

6) How the entry was made, "the fact that entry was not forcible aids in showing reasonableness of police attitude and conduct";

7) What time the entry was made, whether during the daytime or during the nighttime. (392-393)

The *Dorman* court reviewed the facts before it in light of these factors and held that the warrantless entry and arrest was justified.

> Dorman had been positively identified as one who had committed a crime of violence. . . . There was no special knowledge that he was home, but concepts of probable cause and reasonableness prima facie justify looking for a man at home after 10 PM.
>
> There was at least a possibility that delay might permit escape, when and if the suspect came to realize his papers had been left behind. These factors are offset somewhat, but not decisively, by the circumstance that the entry after 10 PM came some four hours after the offense. This was not a case of hot pursuit .... But the ultimate underlying circumstances were similar to those involved in a case of hot pursuit. The police were still dealing with a relatively recent crime, and prompt arrest might locate and recover the instrumentalities and fruits of the crime before otherwise desposed of. And the delay was not of their own making .... The courts have respect for the intelligent law enforcement activities of the police, situated as they are in the front line of the campaign for law and order, and this case plainly depicts police officers engaged steadily and systematically in the identification and pursuit of the criminal suspects. (393-394)

As the *Dorman* court also noted, since the officers there had to return to their station to obtain positive identification, a return which "facilitated access to the chambers of a judge or commissioner, there is no testimony that the kind of short delay inherent in the making of any application for a warrant would be intolerable." (394) The non-obtaining of that warrant, and the lack of testimony relating to it, were not led to require reversal however as "(o)ther courts have noted the materiality of the difficulty of obtaining a warrant late at night

or in the early morning hours before the start of the normal working day." (395) *Citing Ker v California*, 374 US 23, 83 S. Ct. 1623, 10 LEd2d 726 (1963); *United States v Pierce*, 224 F2d 281 (CA6-1954). See also *United States v Hendrix*, 595 F2d 883, 886 (CADC-1979).

The factors enunciated by the Dorman Court have been relied upon by most of the other federal circuits. *United States v McEachlin*, 670 F2d 1139, 1144 (CADC-1981); *United States v Adams*, 621 F2d 41 (CA1-1980); *United States v Price*, 345 F2d 256, 259 (CA2-1965); *United States v Reed*, 572 F2d 412, 424 (CA2-1977); *United States v Martinez-Gonzales*, 686 F2d 93, 100-101 (CA2-1982); *Government of the Virgin Islands v Gereau*, 502 F2d 914, 928 (CA3-1971); *Vance v North Carolina*, 432 F2d 984, CA4-1970); *United States v Kreimes*, 649 F2d 1185, 1192 (CA5-1981); *United States v Shye*, 492 F2d 886 (CA6-1974); *United States v Scott*, 578 F2d 1186, 1189 (CA6-1978); *United States v Acevedo*, 627 F2d 68 (CA7-1980); *Salvador v United States*, 505 F2d 1384 (CA8-1974); *United States v Kulcsar*, 586 F2d 1283, 1286-1288 (CA8-1978); *United States v Williams*, 604 F2d 1102, 1121-1123 (CA8-1979); *United States v Phillips*, 497 F2d 1131 (CA9-1974); *United States v Stubblefield*, 621 F2d 41 (CA9-1980).

As noted in *Martinez-Gonzales*, *supra*, the *Dorman* factors represent a list that is

> . . . illustrative, not exclusive; other factors may be relevant. Moreover, the absence or presence of particular factors is not conclusive. The determination of exigent circumstances vel non necessarily turns upon whether in light of all the facts of the particular case there was an 'urgent need' that 'justif(ies)' a warrantless entry. (100)

As stated in *McEachin supra*, "In determing whether the government has met its burden of demonstrating that the 'exigencies of the situation' made a warrantless search 'imperative', . . . we must be guided 'by the realities of the situation presented by the record.'" (1144)

In *United States v Campbell*, 581 F2d 22 (CA2-1978) a factual situation similar to that presented by the present case obtained. In *Campbell*, an armed robbery took place at about 10:30 AM. A co-defendant was arrested almost at once by police. That co-defendant confessed to police at about 2 PM, naming the defendant as an accomplice and giving an address. At 4:15 PM the local US Attorney authorized a warrantless arrest. Defendant was arrested at about 6 PM. The Court addressed the Dorman factors and the absence of a warrant. "To secure a warrant would have required the police and agents to wait at least several more hours until the facts were fully communicated to headquarters, typed in affidavit form, attested to, presented to one of the district's busy magistrates, and a warrant obtained in due course." (26–27)

The above cases and reproduced language assume great relevance here when it is remembered that this defendant lost his wallet in the rear seat of the complainant's car and that that wallet contained his identification and an address. Had police followed the logic of the Michigan Supreme Court, they would have prepared an arrest warrant and (possibly) received judicial sanction for such a warrant for the address contained on the recovered identification (an address that police through their continuing investigation discovered the defendant no longer resided at). Then, after executing that warrant (potentially several hours later considering the police unit received the identification and address information at 11:45 PM) and discovering that the defendant had moved, police would have had to return to headquarters, prepare another warrant, then attempt to obtain authorization for it, maybe from the same judicial officer who approved the first warrant and who probably would then believe that the police were not adequately investigating a criminal matter before seeking a warrant. That magistrate might, under those circumstances, refuse to authorize this second warrant until police possessed more information. The police then would be forced to go to the newly discovered address, ascertain if in fact the defendant lived there

and still happened to be present, thus, more likely than not, bringing about a set of circumstances where they would have to seek information from the owner of the residence who would, as he did in this case, take police to defendant's room and, after knocking and calling out defendant's name several times, open defendant's door thus exposing defendant to the view of the police. The police would then have been forced to arrest the defendant as, if they did not, he would of course realize his predicament and flee. This strained activity and result can certainly not be the preferred course and most certainly was not the intended course of the Supreme Court in *Payton supra*.

The cases relied upon by the Michigan Supreme Court do not require the result that Court reached, nor do they detract from the principles set forth above.

In *United States v Houle, supra*, a case decided before *Payton*, the following facts existed. "In the early morning hours" police received information that the defendant threatened to shoot another person at a specific location. Officers responded to that location, heard gunshots, and removed the potential victims to the police station. This was about 2:40 AM. Shortly after arriving at the police station, police received a call from the defendant who said he would shoot any officer that came into the area but that they should come back and talk to him in the morning. At 6:40 AM the officers went to the location of the defendant and arrested him in his home, seizing a rifle and two spent shell casings. Police had made no attempt to obtain an arrest warrant in the intervening four hours. (1298) The court found that there was a deliberate four hour delay which destroyed any reliance on an exigency theory. (1300) Dorman was cited as were several other similar cases. Houle does not operate contrary to *Dorman*; it merely shows a set of circumstances in which intended police delay will not excuse the failure to obtain a warrant. Those facts are not however the facts of this instant case.

In *Niro v United States, supra*, FBI agents set up a surveillance of part of a garage leased to the defendant. They were found to have probable cause to believe that the defendant and others were involved in the interstate transportation of stolen goods. (536) The agents knew from the caretaker that defendant was in possession of two tractor trailers that had been recently stolen. When other agents arrived, they used a key provided by the caretaker and entered the garage and arrested the defendant and other persons. The court also found that the agents had probable cause to arrest the defendant. The Court found that this probable cause to arrest had existed for over twelve hours prior to the entry and arrest without warrant. (538) The Court specifically noted,

> We think it proper to say that while the failure to obtain a warrant when one could readily have been had is not of necessity fatal to a search or seizure concomitant with an arrest the nature of which had been fully anticipated, it will be fatal unless there are at least some countervailing factors. We need not define such circumstances. In the case at bar we find none. We hold that the government cannot rely upon an expected arrest to seize stolen goods., the presence of which it long had probable cause to know of, simply to avoid the inconvenience of obtaining a search warrant .... Haste does not become necessary in the present sense if the need for it has been brought about by deliberate and unreasonable delay. (539-540)

It is readily seen that the Michigan Supreme Court in citing *Niro, supra*, disregarded its controlling facts and improperly lifted one paragraph from the opinion and then used that paragraph, taken out of context, to attempt to justify the result in the present case. The Petitioner does not assert that *Niro* was improperly decided. The Petitioner merely asserts that the Michigan Supreme Court cannot rely on Niro to support

the result it was determined to reach here regardless of the totality of the circumstances presented by this instant case.

When reference is made to *Payton* itself, the error of the Michigan Supreme Court is made even clearer.

The question before the Supreme Court in *Payton* was a "narrow" one relating to the ability of the police to enter a defendant's residence without a warrant and arrest him for a "routine felony". (643, 648) The general rule derived from *Payton* is that a routine felony arrest in the residence of a defendant may not be made absent a warrant *or* the existence of some exception to the warrant requirement. The Court stressed that it was not addressing any of the possible exceptions such as "exigent circumstances";

> . . . we put to one side other related problems that are *not* presented today. Although it is arguable that the warrantless entry to effect Payton's arrest might have been justified by exigent circumstances, none of the New York courts relied on any such justification . . . Accordingly, we have no occasion to consider the sort of emergency or dangerous situation, described in our cases as "exigent circumstances", that would justify a warrantless entry into a home for the purpose of either arrest or search. (648–649)

Thus *Payton* does not mandate the result obtained by the Michigan Supreme Court in this case. That Court's reliance on *Payton* is not based on the objective legal realities of that case, but rather on the subjective intent of that Court and its apparent desire to reverse the instant conviction in the face of controlling federal precedents.

As noted by the Michigan Supreme Court in its opinion, partially quoted above, that Court did not believe that the prosecution had presented any explanation for the delay in arresting this defendant. The Statement of Facts presented

above disposes of that contention. A period of three hours passed. Three addresses were checked by police; time was taken up in travelling from one location to another. It was early in the morning when a magistrate would probably not have been readily available to sign any presented warrant request. And what of the Dorman factors?

A grave offense was certainly committed — a brutal rape and armed robbery. The police had every reason to believe that the defendant was armed; the victim told them so and related the threats defendant had made to her. There was a clear showing of probable cause. Defendant's wallet was recovered from the back seat of the car in which the rape had occurred. There existed a strong reason to believe that defendant would be at his home; it was late at night/early morning and that is where courts are prepared to recognize that persons will be at that time. There was a great likelihood that the defendant would escape if not swiftly apprehended; after all, he had lost is wallet which contained his identification and an address that could be used (as indeed it was) to track him down. The entry was peaceful. The owner of the residence voluntarily let the police enter, and although the entry was made at night, no delay on the specific facts of this case could reasonably be tolerated. Dorman and its progeny support the police action here.

## CONCLUSION AND RELIEF

As noted at the beginning of this Application, the Fourth Amendment to the United States Constitution provides that "The right of the people to be secure ... against unreasonable searches and seizures, shall not be violated ...". The Petitioner respectfully submits that there has been, when the totality of the specific facts of the present case are reviewed, in

reality no unreasonable police action in this case. Those actions of the police here were entirely reasonable and were eminently justified by the circumstances of this case. The decision of the Michigan Supreme Court is simply incorrect.

As noted in *United States v Allen*, 629 F2d 51, 54 (CADC-1980);

> . . . it would smack of hypocrisy to require police officers to be reasonable if we cannot be reasonable too.

Wherefore, the Petitioner respectfully requests that this Honorable Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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## APPENDIX A

## STATE OF MICHIGAN COURT OF APPEALS

### Opinion of the Michigan Court of Appeals

PEOPLE OF THE STATE OF MICHIGAN
*Plaintiff-Appellee,*

v

GREGORY DEVAL PARKER,
*Defendant-Appellant.*

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Docket No. 78-4174. Submitted December 11, 1979, at Detroit. Decided March 5, 1980.

Before: M. J. Kelly, P. J., and M. F. Cavanagh and P. C. Elliott,* JJ.

PER CURIAM. Defendant was charged with, and convicted of, first-degree criminal sexual conduct, MCL 750.520b(1); MSA 28.788(2)(1), and armed robbery, MCL 750.529; MSA 28.797. He claims this appeal by right.

We have reviewed the record and conclude that only one of the five issued raised by defendant need be addressed. That is, whether or not the trial court erred reversibly in permitting evidence of defendant's prior conviction of assault with intent to rob while being armed to be used for purposes of impeachment. We find that it did not.

The complaining witness testified that defendant sprayed something in her face as she exited from her car, told her that he would stab her with a knife if she were not quiet, took $12 from from her wallet, then had her drive them to a secluded spot where he raped her after a struggle. Defendant denied

having taken any money and testified that the complainant consented to intercourse. Defendant's wallet was recovered from the complainant's car, and he was arrested at his boarding house that same night with $12 and a nail file found in the clothes he was reportedly wearing.

Following the prescribed test for review of the present issue, we note that the trial court recognized its discretion in this matter on the record. *People v Worder*, 91 Mich App 666, 674; 284 NW2d 159 (1979). The evidence admitted was a 1971 conviction for assault with intent to rob while being armed to which defendant plead guilty. While that offense was similar to one of the crimes for which defendant was being tried, it was not identical, and any resultant prejudice does not approach the level noted in *People v Worden*, *supra*, 678. An impressive factor in our review is that defense counsel agreed to the admission of evidence of defendant's prior conviction if defendant chose to testify. Defendant did testify at trial and made only one reference to his conviction on direct examination. Thus, it appears that there was no problem with defendant's foregoing the act of testifying due to fear of impeachment, nor was there any alternative means of impeaching him under the given circumstances. *People v Jones*, 92 Mich App 100, 110-111; 284 NW2d 501 (1979). Consideration of all of these factors convinces us that the trial court did not abuse its discretion in this matter.

Affirmed.

P. C. Elliott, J. concurs in the result only.

## APPENDIX B

## *PEOPLE v PARKER* (ON REHEARING)
## (State of Michigan — Court of Appeals)

### Opinion Affirming On Rehearing in the Michigan Court of Appeals

Docket No. 78-4174. Submitted April 15, 1980, at Detroit. Decided October 6, 1980.

Before: M. J. Kelly, P. J., and M. F. Cavanagh and P. C. Elliott,* JJ.

P. C. Elliott, J. Defendant was charged with and convicted by a jury of first-degree criminal sexual conduct, MCL 750.520(b)(1); MSA 28.788(2)(1), and armed robbery MCL 750.529; MSA 28.797. He claims this appeal by right.

The complaining witness testified that defendant sprayed something in her face as she exited from her car, told her he would stab her with a knife if she were not quiet, took $12 from her wallet, then had her drive to a secluded spot where he raped her after a struggle. Defendant denied having taken any money and testified that the complainant consented to intercourse. Defendant's wallet was recovered from the complainant's car, and he was arrested at his boarding house that same night with $12 and a nail file found in the clothes that he was reportedly wearing at the time of the rape and robbery.

At trial, and now on appeal, defendant argues that because the complaining witness never actually saw the knife which defendant purportedly threatened her with, there was insufficient evidence to establish the dangerous weapon element of the crimes charged. The trial court found that sufficient evidence had been produced on this element to submit it to the jury.

We find that there was sufficient evidence for the jury to find that the defendant was armed with a knife or with an article, such as his nail file, used or fashioned in a manner to lead the rape-robbery victim to reasonably believe that the article was a knife. Compare *People v Klimek*, 172 Cal App 2d 36; 341 P2d 722 (1959).

We would be of the same opinion based upon the facts of this case — repeated threats to stab, arm around her neck with the other hand pressed against her side — even if we thought *People v Krist*, 93 Mich App 425; 287 NW2d 251 (1979), lv den 407 Mich 963 (1980), was correct. We wish to express the view that *Krist, supra*, is wrong.

The pertinent facts are stated, as follows, on page 430 of *Krist, supra:*

"Witness Timothy Tiegeler, a clerk at the Beverage Barn, testified that as he returned from the stockroom he was struck, thrown to the floor near the cash register and ordered to lie still. One of the assailants said, 'that they had a .357 magnum and they were going to blow my head off'. Tiegeler stated that although he never saw a gun, nor anything that looked like a gun, he conducted himself as though one was trained on him because of the threat made."

The *Krist* Court vacated the jury conviction of armed robbery and remanded for entry of a conviction of unarmed robbery. We disagree.

If either Krist or his confederate, Surline, was actually armed with the .357 magnum pistol at the time of the robbery, they were both guilty of armed robbery although the gun was not used by either robber nor seen by the victim.

"The word 'armed' as used in statutes of this nature, means furnished or equipped, and the actual display or use of the weapon is unnecessary, since it is the possible use to which the weapon might have been put that controls." 77 CJS 464,465.

In fact, the victim does not even have to be aware or believe that the robber is armed. See *People v Hall*, 105 Cal App 359; 287 P 533 (1930), *People v Klimek*, *supra*, *State v Farmer*, 324 A2d 739 (Me, 1973), and *State v Buggs*, 219 Kan 203; 547 P2d 720 (1976). What would otherwise be an unarmed robbery becomes armed robbery if, in fact, the robber or a partner carried a weapon although it was concealed at all times.

Whether or not Krist or Surline, his accomplice, actually possessed the .357 magnum that one of them said he had was a fact for the jury. The effect and the value of the evidence is for the jury to decide. In *People v Mosden*, 381 Mich 506, 510; 164 NW2d 26, 27 (1969), our Supreme Court held:

"Determination of the factual questions was definitely a function for the jury, not the trial court on motion for new trial nor this Court on appeal. We find there was testimony which, if believed by the jury, as it apparently was, warranted a finding of defendant's guilt beyond a reasonable doubt. We cannot reverse on this ground."

There was evidence that Krist or Surline was armed. One of them told Tiegeler, the victim, that he had a .357 magnum and would blow his head off. That verbal statement was direct evidence that the robber who made it was armed. The jury could believe it and find that he was then telling the truth and was armed. The jury did not have to believe the trial testimony of Krist or of Surline that neither of them really had a gun. The Court of appeals in *Krist, supra,* held that: "[a] verbal statement, without more, is insufficient:; but it was for the jury, not the Court of Appeals, to decide whether Krist or Surline was armed and whether the verbal statement of one of them of that fact was sufficient to establish that element of the crime.

The fallacy of the *Krist* case, *supra,* seems to be a belief that when a weapon is not used or seen, the robber cannot be found to have been "armed with a dangerous weapon", so

that a conviction would have to be based upon the statutory alternative: "or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon". Although we agree that under that alternative phrase something must be used and words alone would not be sufficient, there was evidence in the *Krist* case, specifically the words spoken by the robber, from which the jury could conclude that he was actually armed. Therefore, the alternative, "any article used or fashioned", did not control that case.

Under MCL 750.520b(1)(e); MSA 28.788(2)(1)(e), a person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration, as defined, with a victim (defined as the person subjected to criminal sexual conduct) and if:

"(e) The actor is armed with a weapon or any article used or fashioned in a manner to lead the *victim* to reasonably believe it to be a weapon." (Emphasis added to dispute the possibility of overbreadth raised by commentary to CJI 20:2:10).

The jury that convicted Parker, the defendant in the case before us, could have found that he was armed with a knife because of his verbal statements that he would stab the complaining witness and his accompanying actions that led her to believe that he could. The jury could also have found that if he did not actually have a knife, he used an article, such as the nail file later found in his jacket, in a manner to lead his victim to reasonably that he had a knife at her side. Therefore, with the further finding that defendant subjected her to criminal sexual penetration, the jury could properly return a verdict of guilty of first-degree criminal sexual conduct. Likewise, the jury could have found that he was guilty of armed robbery when he took money from her. *People v Krist*, *supra*, is incorrect, creates error and should be repudiated, but its mistaken

doctrine would not result in reversal of Parker's convictions anyway, because of Parker's actions in addition to his verbal assertions that he was armed.

We find that it was proper to permit use of defendant's prior conviction for impeachment. Our views concerning the MRE 609(a) question are stated in *People v Jones*, 98 Mich App —; — NW2d — (1980).

We find the remaining assertions of error are without merit.

Affirmed.

M. F. Cavanagh, J., concurs in the result only.

## APPENDIX C

### *PEOPLE v PARKER*

### Opinion of the Michigan Supreme Court

Docket No. 66028. Argued March 10, 1983 (Calendar No. 21). Decided October 24, 1983.

Kavanagh, J. (for reversal). This is an appeal from an affirmance of defendant's conviction of armed robbery and first-degree criminal sexual conduct.

We reverse and remand for a new trial.

Complainant testified that someone sprayed a substance into her face as she was getting out of her car in a Detroit parking lot. Her assailant told her that he would stab her with a knife if she did not keep quiet. A struggle ensued in the car, and the assailant took $12 from her wallet. He then directed her to drive from the scene, and they stopped at a deserted location. After a further struggle, during which she was able to scratch her assailant's face, the assailant engaged in forcible sexual intercourse with complainant and fled. Shortly thereafter complainant was able to summon police and describe her assailant to them. The police located a wallet in her car which contained several pieces of identification belonging to the defendant.

The crime occurred during the late evening of February 22, 1978. On the basis of information in the wallet, police located defendant about 2:45 a.m. on February 23. He matched the description of the assailant given by complainant, and he had a laceration under his right eye. He was placed under arrest, and $12 found in the right breast pocket of his jacket and a nail file in his right rear pants pocket were seized.

The defendant testified that he had met complainant when her car had become stuck in the snow. He assisted in extricating the car, and a lengthy conversation ensued in which

complainant told him that she was having marital difficulties and was "tired of old men". She agreed to drive him to a bar, but on the way they stopped at a deserted location and engaged in consensual sexual intercourse. When he told her that she "stunk", a fight ensued, and he left her.

On appeal, the defendant asserts four errors:

## I. ARREST WITHOUT A WARRANT AND ATTENDANT SEARCH AND SEIZURE

A pretrial hearing was held on the legality of the defendant's arrest (with the resulting seizure of articles to be suppressed, if the defendant were successful). The police had no arrest or search warrants. After checking one address for the defendant that was incorrect, the police located him at 271 Watson at about 2:45 a.m. The owner of the building opened the defendant's apartment. The police saw someone sleeping in the bed in the one-room apartment, and the owner identified the person as the defendant. The police awakened the defendant at gunpoint and determined that he had no weapon. Since he generally fit the description of complainant's assailant, the police arrested him. A fingernail file, $12 in cash, and a black coat were taken and later admitted at trial. Statements made by the defendant to the police after his arrest were used to impeach him at trial.

The parties agree that the arrest of defendant without a warrant in his abode was illegal unless the circumstances surrounding it were exigent. *Payton v New York*, 455 US 573, 589; 100 S Ct 1371; 63L Ed 2d 639 (1980), citing *United states v Reed*, 572 F2d 412, 423 (CA 2, 1978). The essence of the exigency which would excuse the failure to obtain a warrant is the existence of circumstances known to the police which prevent them from taking the time to obtain a warrant because to do so would thwart the arrest. *Commonwealth v Huffman*, 385 Mass 122, —; 430 NE 2d 1190, 1192 (1982); Latzer, *Police Entries to Arrest — Payton v New York*, 17 Crim L B 156, 163 (1981).

The prosecutor contends that there were exigent circumstances present at the time the officers effectuated the arrest of defendant after having entered his room without a warrant. In support of this contention, the prosecutor recites the following facts: defendant was believed to be armed with a dangerous weapon, defendant was likely to escape, and a violent crime had been committed. However, we conclude that the facts do not support a finding of such exigent circumstances as would obviate the need for an arrest warrant.

In *Niro v United States*, 388 F2d 535, 540 (CA 1, 1968), the first circuit held that although failure to obtain a readily available warrant is not necessarily fatal to a search or seizure made concurrent with a fully anticipated arrest, it is fatal where there are no countervailing factors. The *Niro* court stated:

"Proceeding without a warrant is not to be justified, as the government suggests here, by the fact that by the time the officers act, dispatch is necessary to avoid flight or injury to person or property. Haste does not become necessary in the present sense if the need for it has been brought about by deliberate and unreasonable delay. This would allow the exception to swallow the principle."

In *United States v Houle*, 603 F2d 1297 (CA 8, 1979), the police received a complaint that the defendant had made threats after he had been drinking to shoot people. Upon their arrival at the scene, at 1:50 a.m., the officers heard two shots from the defendant's house. The police dispatcher received a phone call from the defendant threatening to shoot any officer who came into his yard and demanding that the officers leave the area or return in the morning. The police delayed acting until 6:40 a.m., and then went to the defendant's house to arrest him. When they arrived they saw through a broken window that the defendant was sleeping on a bed. One of the officers saw a rifle and reached in through the window and seized it, whereupon the other officers kicked down the door

and arrested the defendant. The police had made no attempt during the intervening four hours to obtain an arrest warrant.

The *Houle* Court, in an opinion antecedent to *Payton*, held that the Fourth Amendment did not sanction entries into a home without a warrant for the purpose of an arrest absent exigent circumstances. In rejecting the prosecution's claim that exigent circumstances existed, the Court stated:

"This is not a case involving hot pursuit. The officers' deliberate four hour delay from 1:50 a.m. to 6:30 a.m., indicates that the officers had no reason to believe, and did not believe, that the defendant would attempt to escape or destroy the evidence in his possession. It is undisputed that the officers made no attempt to obtain a search or arrest warrant during that period of delay. Any exigency that arose by virtue of the presence of the rifle near the bed could have been anticipated by the officers and does not excuse their earlier failure to obtain a warrant." 603 F2d 1300.

In the case at bar, there was over a five-hour delay between the time the police were given a physical description of the complainant's assailant and when they arrested defendant without a warrant. The prosecution has offered no explanation whatsoever as to why a warrant was not sought during this interval. Inasmuch as the prosecutor has not proffered any countervailing circumstances which justify the failure to secure a warrant, we hold that the police did not act reasonably in entering defendant's room without arresting him, and seizing evidence. Therefore, defendant's motion to suppress the evidence seized as a result of the entry without a warrant should have been granted.

## II. SUFFICIENCY OF THE EVIDENCE THAT DEFENDANT WAS ARMED WITH A DANGEROUS WEAPON

Before its codification in 1931, the armed robbery statute provided:

"Sec. 15. If any person shall assault another, and shall feloniously rob, steal and take from his person any money or other property, or shall feloniously assault another with intent to rob or steal any money or other property, which may be the subject of larceny, such robber being armed with a dangerous weapon, or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon, with intent, if resisted, to kill or maim the person robbed or assaulted, or if, being so armed, he shall wound or strike the person robbed or assaulted, he shall be punished by imprisonment in the state prison for life or any number of years." 1927 PA 374; 1929 CL 16722.

Act 328 of the Public Acts of 1931 codified Michigan's criminal law. Roberry armed was treated in Sec. 529 of the act and provided:

"Sec. 529. Robbery armed — Any person who shall assault another, and shall feloniously rob, steal and take from his person, or in his presence, any money or other property, which may be the subject of larceny, such robber being armed with a dangerous weapon, or any article used or fashioned in a manner to lead the persons so assaulted to reasonably believe it to be a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison for life or for any term of years."

The 1931 amendment thus eliminated the clause beginning with the words "with intent". We think it clear from that history that when enacted the words "dangerous weapon",

etc., contemplated that the defendant would actually have a dangerous weapon; this is implicit in the phrase "with intent, if resisted, to kill or maim". The elimination of the "with intent" requirement reduced the prosecutor's burden of proof, but does not provide a basis for construing the section as no longer requiring that the defendant actually have a dangerous weapon or an article used or fashioned in a manner to lead the persons so assaulted to reasonably believe it to be a dangerous weapon.

It is not enough that the person assaulted is put in fear; a person who is subjected to an unarmed robbery may be put in fear.

To constitute armed robbery the robber must be armed with an article which is in fact a dangerous weapon — a gun, knife, bludgeon, etc., or some article harmless in itself, but used or fashioned in a manner to induce the reasonable belief that the article is a dangerous weapon.

Words or threats alone can never be dangerous weapons because the statute is concerned with weapons, not words.

To convict, the factfinder must make the determination that at the time of the robbery the assailant was in fact armed with something and not just that the victim thought he was armed. The determination must be based on the evidence.

Words or threats may be evidence of the fact of being armed and under some circumstances they along might support a verdict of guilty. When no other evidence of the presence of the weapon is adduced, however, it is imperative that the instructions stress the focus of the jury on the presence of the weapon or article and not the fear or belief of the victim.

Unarmed robbery is a heinous felony, and the statute's 15-year maximum penalty shows how seriously the Legislature regards it. Michigan's ultimate punishment — life imprisonment — for armed robbery should not be cheapened by escalating a questionable charge to allow it.

In the case at bar, the only proper evidence that the assailant was armed with a dangerous weapon at the time of the assault was the complainant's testimony that the assailant "told me to shut up, otherwise he would use his knife and stab me".[1]

Because this case must be remanded for a new trial we point out that although under proper instructions a jury verdict of guilty on this evidence would not be overturned, the instructions given here would not pass muster.

The instructions given, "Ladies and gentlemen, in order to fulfill the dangerous weapon element of the charge of robbery armed, it is not necessary that a weapon be introduced at trial, nor is it necessary for the complainant to see the weapon. All that is required is that the complainant have a reasonable belief that the defendant was armed with a dangerous weapon at the time of the incident, and for you to be convinced beyond a reasonable doubt of this belief", is patently in error.

Had this question been before us, we would have reversed on this issue, but because it was not we mention it only to obviate the problem on retrial.

What we have said about the armed element in the robbery statute has equal application to the first-degree criminal sexual conduct charge as brought herein. We note, however, that under a proper charge, inasmuch as unarmed robbery is also a felony, if that crime be proved, first-degree criminal sexual conduct under MCL 750.520b(1)(c); MSA 28.788(2)(1)(c) can be made out. *People v Willie Johnson*, 406 Mich 320; 279 NW2d 534 (1979).

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1 Neither her testimony that "he said he should have pulled out his knife and stopped me" nor the finding of the fingernail file in his pocket several hours after the assault is any evidence that he was armed at the time of the attack.

## III. INEFFECTIVE ASSISTANCE OF COUNSEL

Before the defendant testified, outside the presence of the jury, the prosecutor informed the court that he understood that defense counsel intended to introduce evidence of defendant's prior conviction of the felony of assault with intent to rob, not being armed. MCL 750.88; MSA 28.283. He reminded the court that only if the court determined that the offense was one involving theft, dishonesty, or false statement, or was punishable by death or imprisonment for more than one year, and that its probative effect on the issue of credibility outweighed its prejudicial effect, could the court admit it. The judge acknowledged awareness of the rule and indicated that he would admit the evidence.

Defense counsel acknowledged that he intended to introduce the evidence on direct examination of the defendant and that he was agreeable to its admission.

The defendant testified about his conviction, and the prosecutor did not cross-examine him about it.

Defendant now argues that the failure of defense counsel to try to keep out any reference to his criminal record, let along the volunteering of it, amounted to ineffective assistance of counsel. Because of the similarity of the offense to the present charge, defendant maintains, the probative value of the evidence was clearly outweighed by its prejudicial effect and its admission constituted error.

We are not persuaded. While we are not inclined to recommend this strategy on retrial, we are not prepared to hold it amounted to ineffective assistance of counsel.

## IV. COMPELLING ATTENDANCE OF AN ILL JUROR

As the jury was to begin its second day of deliberations, one juror was not present, having called in sick. Defense counsel objected to proceeding with 11 jurors. On the judge's instruction, the court clerk called the juror in the presence of the

judge and the prosecutor but without the presence of defense counsel. The clerk reported that the juror responded that she had a sore neck and a cold brought on by the airconditioning. The judge decided that the juror was not too ill to come in, the juror was brought to the court in a police car, and deliberations resumed. When he learned of this, defense counsel objected to the failure to involve him in the process, but neither attempted to prove nor indeed did he claim any prejudice to the defendant on account of it.

While the unilateral procedure followed here leaves much to be desired, until we are persuaded that it resulted in denying defendant a fair trial, we will not reverse.

The question we must answer is whether there is any reasonable possibility that the defendant was prejudiced. A reasonable possibility of prejudice may not rest upon the bare assumption that the prosecutor or the judge engaged in some misconduct or that the police who transported the juror attempted to influence her. Without some basis on the record for such an assumption, it is unwarranted. To make that assumption, defense counsel, either during trial or at some other point, should have buttressed this issue by questioning the police officer who transported the juror or by inquiring of the juror herself once the verdict was returned. We have no idea whether the juror was so sick that her only thought was to end the deliberations as quickly as possible. On this record we do not find error on the claim which requires reversal.

Reversed and remanded.

Williams, C. J., and Levin and Brickley, JJ., concurred with Kavanagh, J.

Cavanagh and Boyle, JJ., took no part in the decision of this case.

Ryan, J. (concurring). I concur in the Court's decision to reverse and remand for a new trial because I agree that the

circumstances of the defendant's arrest did not excuse the warrant requirement of US Const, Am IV, and Const 1963, art 1, Sec. 11.

Since the jury learned that the warrantless entry into the defendant's room resulted in the seizure of $12, the exact amount of money the victim claimed was stolen from her, I cannot conclude that the constitutional violation was harmless beyond a reasonable doubt. See *Chambers v Maroney*, 399 US 42; 90 S Ct 1975; 26 S Ed 2d 419 (1970), and *People v Robinson*, 386 Mich 551; 194 NW2d 709 (1972).

## APPENDIX D

## APPLICATION FOR CLARIFICATION OF OPINION OF THE MICHIGAN SUPREME COURT

NOW COMES John D. O'Hair, Prosecuting Attorney for the County of Wayne, Edward Reilly Wilson, Deputy Chief, Civil and Appeals, and A. George Best II, assistant Prosecuting Attorney, and, in support of this Application For Clarification states that:

1) On 24 October 1983 this Honorable Court issued its opinion in *People v Parker*, #66028. In that opinion this Court reversed a conviction for criminal sexual conduct first degree and armed robbery. This court found a *Payton v New York*, 445 US 573, 63 LEd2d 639 (1980) and reversed on that basis. (Slip, page 5).

2) The Court also, as dicta, addressed the question of the evidentiary support for the armed robbery conviction. This Court quoted the relevant statute:

> Any person who shall assault another, and shall feloniously rob, steal and take from his person, or in his presence, any money or other property,... such robber being armed with a dangerous weapon, or any article used or fashioned fashioned in a manner to lead the persons so assaulted to reasonably believe it to be a dangerous weapon, shall be guilty of a felony.... (MCLA 750.529)

The court noted the distinction between the two possible bases for a successful armed robbery prosecution: first, "that the defendant actually have a dangerous weapon", *or*, second, "an article used or fashioned in a manner to lead the persons so assaulted to reasonably believe it (an article) to be a dangerous weapon." (Slip, page 6)

The Court then went on to discuss the present case in terms of the first aspect of the armed robbery statute: i.e., to address

the facts of the case as if the defendant were *actually armed* (under the facts of this case, with a knife, based on his statements to the victim prior to, during, and after the criminal sexual conduct, first degree. And, as noted below, based on his actions at the time of the rape and robbery.) Using this basis, this Court noted that "To constitute armed robbery the robber *must be armed with an article which is in fact a dangerous weapon* . . . or some article harmless in itself, but used or fashioned in a manner to induce the reasonable belief that the article is a dangerous weapon." (Slip, page 6, emphasis added)

This Court did not address the facts of the present case on the second supportive basis of an armed robbery prosecution, that being that the victim *reasonably believed that an article possessed by the defendant was a dangerous weapon*. This Court noted that while words alone are never enough to satisfy the statute, "words or threats may be evidence of the fact of being armed and under some circumstances they along might support a verdict of guilty." (Slip, page 6) This Court found this to be an instructional problem however. (Slip, page 6–7)

This Court then noted that the question of the correctness of the instruction given vis a vis this problem *was not before the Court*. (Slip, page 7) Thus, the Court's analysis of the issue is merely gratuituous dicta and does not form a basis upon which the conviction was reversed. Since this "question" was not before the Court, and since the People did not have an opportunity to respond to this "issue", this recognition by the Court of the non-addressibility of the "issue" is correct.

Nevertheless, since the issuance of the opinion in this case, a distinct and reoccuring problem has arisen in the Detroit Recorder's Court in armed robbery cases. Several judges have read the language of this Court to the effect that in the future *no* armed robbery conviction can be obtained unless the

defendant was in fact *actually armed*. The People submit that that is neither what this Honorable Court said nor is it what this Honorable Court intended to say, nor does such a position accord with the statute in question or with applicable case law precedents. *People v Jury*, 3 Mich App 427, 432 (1966); *People v Washington*, 4 Mich App 453 (1966), *Lv. Den.*, 479 Mich 783 (1966); *People v Meyers*, 16 Mich App 618, 619 (1969); *People v Davie*, 20 Mich App 526, 527 (1969), *Lv. Den.*, 383 Mich 776 (1969); *People v Shipp*, 34 Mich App 67, 69 (1971). Special reference should be made to *People v Kroper*, 340 Mich 114 (1954) relied on by the Court of Appeals in *Jury*, *supra*, wherein this Court stated that:

> There was evidence that the storekeeper was placed in fear by defendant and had reasonable belief that he might suffer injury and thereby submitted to the defendant's taking of his property.

That the above cases do represent controlling law is reflected by this Court's language on page 7 of the present slip opinion:

> . . . under proper jury instructions a jury verdict of guilty on this evidence would not be overturned. . .

To further support this contention, reference must only be made to this Court's opinion in the instant case where this Court held that:

> In the case at bar, the only proper evidence that the assailant was armed with a dangerous weapon at the time of the assault was the complainant's testimony that the assailant "tole me to shut up, otherwise he would use his knife and stab me." Slip, page 7

3) Thus, the Poeple request that this Honorable Court issue an order which clarifies this language and makes plain to all members of the bench and bar of this state who may read

this Court's opinion that an "actually armed" defendant is *not* the sole basis upon which an armed robbery conviction may be obtained.

4) The People also wish to note that the basis of this Court's dicta opinion relating to the quantum of evidence available as to the question of defendant's being armed at the time of the rape and robbery is simply incorrect. As noted by the Court:

> . . . the only proper evidence that the assailant was armed with a dangerous weapon at the time of the assault was the complainant's testimony that the assailant "told me to shut up, otherwise he would use his knife and stab me".[1]

No definition of the phrase "proper evidence" is provided for the edification of the bench or bar but certainly statements of the defendant shortly after the conclusion of the rape and macing of the victim relating to his possession of a knife are "proper" evidence of the fact of his being armed and of the intent he possessed at that time. Additionally, this Court totally overlooked testimony of the victim that the defendant held his hand into her side when his repeated threats of physical violence with a knife were made. She undeniably felt pressure in her side and, because of it, submitted to the assault and robbery. It is also unconceivable to the People that the finding of a nail file in the defendant's possession at the time of his arrest, while also in possession of the amount of currency taken from the victim is said to be "no evidence" of his being armed at the time of the rape/robbery. It most certainly is *some* evidence of his having been armed — at least it presents an additional factor for the jury to consider.

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[1] Neither the testimony that "he said he should have pulled out his knife and stopped me" nor the finding of the fingernail file in his pocket several hours after the assault is any evidence that he was armed at the time of the attack. (Slip, pages 6-7, i)

Wherefore, for those reasons presented above the People respectfully request that this Honorable Court issue a clarifying order in this case.

Respectfully submitted,

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